

**WEST VIRGINIA PUBLIC
EMPLOYEES GRIEVANCE BOARD**

**KATRINA SEBOLT,
Grievant,**

v.

Docket No. 2016-0168-LogED

**LOGAN COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Katrina Sebolt, was employed by Respondent, the Logan County Board of Education (“Board of Education”) as a school bus operator. Ms. Sebolt filed a grievance against Respondent on August 19, 2015, at Docket No. 2016-0168-LogEd, stating,

“Respondent terminated Grievant’s employment for failure to possess a valid high school diploma or GED. Prior to Grievant’s employment by Respondent six years ago, Grievant was advised by then superintendent and personnel director that if she secured a high school diploma from Belford High School, an online institution, that would suffice. In reliance upon their approval, Grievant undertook the study course from that institution, passed the appropriate test, received a diploma, submitted it to Respondent, was hired and successfully performed her duties since that time. Grievant contends that it is arbitrary and capricious and a violation of W. VA. CODE § 18A-2-6.”

The relief sought was:

"(a) reinstatement (b) compensation for all lost wages and all benefits, pecuniary and nonpecuniary, with interest; (c) removal of all references to Grievant’s termination from any file maintained by Respondent and its agents."

Because this grievance concerns a termination, it was filed directly to Level III. The Level III hearing was held before the undersigned on November 6, 2015. Grievant was

represented by Mr. John Everett Roush, Esq. and Respondent was represented by Ms. Shana L. O'Briant Thompson, Esq. At the conclusion of the Level III hearing, the parties agreed to submit post-hearing arguments, the last of which was received on December 21, 2015, upon which date this matter became mature for decision.

Synopsis

Respondent asserts it properly terminated Grievant's employment as a bus operator because she did not have a legitimate, "accredited," "high school diploma," to allow her to meet the educational qualifications under W. Va. Code § 18A-2-5, making her "incompetent" under W.VA. CODE § 18A-2-8 to either hold or be recertified for the position. Respondent allowed Grievant to remain in her position after OEPA discovered her "educational deficiency," under the condition that she must obtain a GED to correct it. Respondent asserts it offered Grievant a reasonable period of time to correct her educational deficiency, by giving her approximately 7- 8 months to obtain a GED but she failed to meet the imposed deadline.

Grievant contends that Respondent's action in terminating her because she was allegedly educationally unqualified was arbitrary and capricious in that her "high school diploma" was sufficient. Respondent proved Grievant's "high school diploma" was deficient under W. VA. CODE § 18A-2-5. Respondent proved it acted reasonably by asking Grievant to pass a high school equivalency exam to correct the deficiency.

Grievant proved Respondent wrongfully terminated her, because it erroneously believed she was ineligible for recertification under W.VA. CODE § 18A-2-5 and, therefore, "incompetent" under W.VA. CODE § 18A-2-8. However Grievant was provisionally educationally qualified under the contingency clause of W. VA. CODE § 18A-

2-5 and, therefore, was competent and eligible for recertification. This clause permitted Respondent to recommend Grievant for recertification and allowed her to remain in her position, provided that she was continuously enrolled in an adult education program to obtain her GED or TASC and passed the exam within a reasonable time period, as prescribed by Respondent. Grievant further proved that Respondent arbitrarily and capriciously assigned an insufficient amount of time for Grievant to obtain her GED, which lead to her wrongful termination.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Respondent, Logan County Board of Education, is a quasi-public corporation created by statute for the management of the public schools of Logan County, West Virginia.

2. Beginning in approximately April of 2009, Grievant worked as a substitute bus operator for the Board of Education. Beginning on or about August 16, 2011, she worked for Respondent as a regular bus operator.

3. Before Respondent hired her, Grievant obtained a high school diploma, online, through Belford High School ("Belford").

4. County boards must abide by the requirement of W. VA. CODE § 18A-2-5, that,

"... a county board shall not employ for the first time any person who has not obtained a high school diploma or GED or who is not enrolled in an approved adult education course by the date of employment in preparation for obtaining a GED: *Provided*, That such employment is contingent upon continued enrollment or successful completion of the GED program." (*Emphasis in the original.*)

5. When Respondent initially hired Grievant as a substitute bus driver in 2009, she provided her diploma from Belford to Respondent, which was accepted without any questions concerning its sufficiency or validity.

6. In January of 2014, the Office of Educational Performance Audits (“OEPA”) of the West Virginia State Board of Education (“State Board”) conducted an on-site audit of the Logan County School system that included an audit of its Personnel Department.¹

7. Following that audit, the Superintendent of Logan County schools, Ms. Phyllis Doty, was put on oral notice of OEPA’s finding that one of the service employees in Logan County had a diploma issued from Belford. OEPA advised Respondent that Belford was an unaccredited “diploma mill.” Consequently, OEPA advised Respondent that the high school diploma issued by Belford was insufficient to meet the educational requirements of either a high school diploma or a General Equivalent Development Assessment (“GED”), specified under WEST VIRGINIA CODE § 18A-2-5.²

8. OEPA issued an oral directive to Respondent to correct the educational “deficiency” of the service employee in question by requiring her to obtain a GED. (Level III Testimony of Phyllis Doty.)

9. Because of the directive, Respondent made a call to Belford to learn more about it.

¹ OEPA works under the direction of the State Board and was established to assist the Governor, the Legislature, State Board and county boards of education in ensuring that high quality educational standards and annual performance measures and progress are met by all schools and school systems, and that a thorough and efficient system of schools is provided. See, West Virginia Board of Education Policy 2320 § 13.1 (126 C.S.R. 13.1).

² The employee’s name is irrelevant. See Respondent’s Ex. 8.

10. If findings of OEPA are not corrected, a county school system may be "taken over" by the State Board.³

11. Respondent met with the service employee to discuss the "deficiencies" of a Belford diploma and gave the employee the opportunity to correct the asserted deficiency by requiring her to provide official proof, on or before June 30, 2014, that she had obtained her GED.⁴ She provided her GED to Respondent.

12. In early December of 2014, a bus operator for Respondent called Superintendent Doty to advise her to review Grievant's diploma.⁵

13. Superintendent Doty and Respondent's Personnel Director, Ms. Elizabeth Thompson, thereafter reviewed Grievant's diploma, and noted it was also from Belford.⁶

14. On December 17, 2014, Superintendent Doty and Ms. Thompson held a meeting with Grievant to inform her that her Belford diploma was unacceptable to meet the educational requirements of the bus operator's position.

15. At the December 17, 2014, meeting, during discussion of Belford, Grievant informed Respondent that she paid approximately \$200.00 to Belford to obtain her diploma and that Belford would have provided the "correct year" of her high school graduation on her diploma, if Grievant had paid more.⁷ As a part obtaining her diploma, Grievant also received curriculum materials from Belford, studied them, and took and

³ Level III Testimony of Phyllis Doty.

⁴ *Id.*

⁵ Respondent's Ex. 7.

⁶ Testimony from Ms. Doty confirmed that she attempts to investigate all calls received regarding allegations made against the school district's employees.

⁷ See Respondent's Ex. 2. - Presumably the diploma would have borne the year Grievant would have graduated from high school if she had she graduated at 18 years of age.

passed an online test. Belford provided a transcript of Grievant's studies, which included Algebra I and Chemistry. Grievant could not specifically recall what her studies with Belford entailed, but recalled writing essays as part of the process to receive her diploma. Grievant's recollection of her courses was generally very vague.

16. On December 17, 2014, Superintendent Doty and Ms. Thompson made a telephone referral on Grievant's behalf to enroll her in the Adult Basic Education ("ABE") study courses at the Ralph R. Willis Career and Technical Center, to assist her to prepare for the TASC assessment to obtain her high school equivalency or GED.⁸

17. Ms. Thompson sent a letter to Grievant, dated December 18, 2014, stating, "As you were told, the Personnel Department found out that your diploma was a fake. In our meeting you explained that you paid on line to take the test (that you passed) and then was [sic] awarded a diploma." Respondent also placed Grievant on notice that she had until June 30, 2015, to present Respondent with an official copy of a GED, or face termination of her employment.⁹

18. OEPA also determined that Stratford Career Institute ("Stratford") is not an approved on-line program through which a legitimate diploma can be awarded.

19. Respondent identified a service employee who submitted a diploma from Stratford and Respondent also required her to obtain and submit proof of her GED to maintain her position. This service employee was first notified on or about March 17, 2015, that the deadline for her to provide this proof was June 30, 2015, which gave her

⁸ The GED is no longer used in West Virginia. Instead, the high school equivalency assessment presently used is the Test Assessing Secondary Completion ("TASC"). Both tests are nationally recognized, legitimate, high school equivalency assessments. GED and TASC will hereafter be used interchangeably.

⁹ Respondent's Ex. 3.

approximately 3 months less time to prepare for, take and pass the GED exam than Grievant.¹⁰ She timely provided the GED by June 30, 2015.

20. After Respondent advised Grievant that she needed to acquire a GED by June 30, 2015, or be terminated, she began to attend the ABE study courses at the Ralph R. Willis Career and Technical Center, for assistance in studying for the TASC exam. She took the TASC exam on or about June 23, 2015, but passed only one of five sections and was, therefore, unable to obtain her GED by the June 30, 2015, deadline.

21. The ABE instructor at the Ralph R. Willis Career and Technical Center, appeared and testified that with “good effort” it typically takes approximately 3 months for individuals to adequately prepare for and pass the TASC exam, while others individuals take up to two years. The ABE instructor stated that Grievant did not make a good effort in terms of class attendance. However, other than the month of February of 2015, when she sustained a work-related injury, Grievant attended ABE classes with some frequency. TASC exam preparation material is also available online.

22. By letter dated July 17, 2015, Respondent informed Grievant it had not received official proof that she had obtained her GED and gave her notice that Respondent would meet with her on July 27, 2015, to discuss this issue. Grievant acknowledged receipt of the letter dated July 17, 2015.¹¹

23. On July 27, 2015, Grievant and her union representative met with Respondent’s Assistant Superintendent, Ms. Mary Lou MacCorkle. At that meeting,

¹⁰ Respondent's Ex. 9.

¹¹ Respondent's Ex. 4.

Grievant requested an extension of time to obtain her GED. Though not reduced to writing, Superintendent Doty agreed to a short extension of the deadline.¹²

24. The ABE instructor's letter of August 13, 2015, stated that the last TASC test given in Logan County was administered on June 23, 2015. His letter further revealed that, "Unfortunately the TASC test has been suspended in West Virginia, statewide, until issues with this test's publisher are resolved."¹³ Therefore, Grievant did not have any time beyond the June 2015, TASC exam to take another exam before the School Board met and terminated her.

25. Pursuant to West Virginia Board of Education Policy 4336 §.15.1 (126 C.S.R. 92.15.1), the West Virginia Department of Education ("WVDE") recertifies school bus operators, on an annual basis, for the forthcoming school year. As part of this annual renewal process, county superintendents must attest that the bus operators for their school districts hold the proper credentials to be recertified. The Department of Facilities and Transportation for the WVDE issues re-certifications in reliance upon the superintendent's recommendation. Grievant was recertified as a bus operator until 2015, with no questions raised concerning the sufficiency of her Belford diploma.¹⁴

26. Mr. Michael Pickens, the Executive Director of the Office of School Facilities and Transportation ("OSFT") for WVDE appeared and testified that OSFT relies upon

¹² The record does not reflect exactly how long this extension was, but it was clearly on or before August 13, 2015, when Grievant was terminated.

¹³ In addition, when a tester has failed a portion of the exam, there is a month long waiting period before she can take it again.

¹⁴ Level III Testimony of Mr. Pickens and Superintendent Doty. This policy was not introduced into evidence and is only incorporated by reference in the rule. Level III Testimony of Mr. Pickens and Superintendent Doty.

county school superintendents to attest that county bus drivers are qualified for recertification.

27. The recertification process for the Department of Transportation of WVDE differs from the initial certification process. Some of the requirements for recertification include passing a medical examination, obtaining certification in CPR and first aid, and taking the requisite twelve hours of training; but educational qualifications are not mentioned.¹⁵

28. Concerned about Grievant's "educational deficiency," which had not been corrected, Superintendent Doty requested guidance from Mr. Charles Heinlein, the former WVDE Deputy Superintendent, Ms. Heather Hutchens, WVDE's General Counsel and Mr. Michael Pickens for their advice on whether she could properly execute the required documents to have a bus operator recertified for the upcoming school year if she (Superintendent Doty) had knowledge that the bus operator did not hold the proper credentials to be recertified.

29. After consulting with these individuals, Superintendent Doty was advised that she could not, in good faith, recommend Grievant for recertification for the upcoming school year, when she (Superintendent Doty) believed Grievant did not possess the minimum educational qualifications required for the bus operator's position.

30. By letter dated July 29, 2015, Grievant was given notice that, because she had failed to timely present Logan County Schools with an official copy of her completed

¹⁵ Level III testimony of Mr. Pickens.

GED, “under the provisions of W. VA. CODE §.18A-2-7, Superintendent Doty [would] make a recommendation to terminate Grievant’s employment.”¹⁶

31. Based upon the representations in this letter Grievant requested a hearing before Respondent.

32. On Thursday, August 13, 2015, the Board of Education held a pre-termination hearing and thereafter voted to accept Superintendent Doty’s recommendation to terminate Grievant’s employment.¹⁷

33. Grievant was enrolled in the ABE program to prepare for TASC up and until she was dismissed.

34. Near the beginning of the 2014-2015 school year, Grievant filed a grievance against Respondent, which was resolved relatively quickly. Ms. Thompson was aware of this grievance.

35. Throughout her tenure working for Respondent, Grievant’s service as a substitute and regular bus operator had been acceptable. She was a "good" bus driver, with no performance issues that “brought up” the need for her to obtain a GED.¹⁸

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden of proof by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C. S. R. 1 § 3 (2008); *Ramey v. Dep’t of Health*, Docket No. H-88-005 (Dec. 6, 1988). A preponderance “is generally recognized as evidence of greater weight, or which is more convincing than the evidence

¹⁶ Respondent’s Ex. 5.

¹⁷ Respondent’s Ex. 1 and 6.

¹⁸ Level III Testimony of Superintendent Doty.

which is offered in opposition to it.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep’t of Health and Human Res.*, Docket No 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Respondent asserts Grievant's high school diploma did not meet the educational qualifications for school service personnel at W.VA. CODE §.18A-2-5. Respondent allowed Grievant to remain in her position after discovering her asserted “educational deficiency” under the condition that she must obtain a GED. Respondent asserts it offered Grievant a reasonable period of time to correct her educational deficiency, by giving her approximately seven months to obtain a GED, but she failed to do so by the imposed deadline. Respondent asserts it properly terminated Grievant's employment as a bus operator because Grievant did not have the required educational qualifications, under W. VA. CODE §.18A-2-5 to hold or be recertified for the position. Respondent therefore maintains Grievant was “incompetent” to hold the bus operator’s position under W. VA. CODE §18A-2-8, which justified her termination.

Grievant contends Respondent’s action in terminating her because she was allegedly educationally unqualified was arbitrary and capricious. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*,

769 F.3d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)” *Trimboli v. Dep’t of Health & Human Res.*, Docket No. 93- HHR-322 (June 27, 1997). “Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable.” *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). Grievant makes several arguments in support of her contention which will each be addressed in turn.

The primary dispute in this grievance is whether Respondent arbitrarily or capriciously required Grievant to provide proof of different or additional educational credentials than mandated under WEST VIRGINIA CODE §.18A-2-5. Grievant argues Respondent improperly interpreted WEST VIRGINIA CODE §.18A-2-5, to require an “accredited” diploma of its school service personnel, when the statute simply requires a “high school diploma,” without further qualification or definition. Grievant maintains her Belford diploma is sufficient under the statute. County boards must abide by the requirement of W. VA. CODE §.18A-2-5 that,

“ ... a county board shall not employ for the first time any person who has not obtained a high school diploma or GED or who is not enrolled in an approved adult education course by the date of employment in preparation for obtaining a GED: *Provided*, That such employment is contingent upon continued enrollment or successful completion of the GED program.” (*Emphasis in the original.*)

At issue then, is the meaning of “high school diploma.” “ ‘In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.’ *Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey*, 399 S.E.2d 657 (W.Va. 1990), citing *Hodge v. Ginsberg*, 303 S.E.2d 245 (W.Va. 1983).”

Also see Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992). Clear and unambiguous language ordinarily must be applied not construed. *Miller v. Board of Educ. of County of Boone*, 190 W. Va. 153, 437 S.E.2d 591 (1993). An ambiguity may be found to exist where: (1) the language can be understood in more than one way or refers to two or more things simultaneously; or (2) the statutory language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. *Brown v. Lukhard*, 229 Va. 316, 330 S.E.2d 84 (1985). Firstly the undersigned notes there are numerous West Virginia statutes that require a “high school diploma,” without further qualification or definition, as one of the prerequisites to obtaining either state employment or state-issued licenses and certifications. However, the undersigned is unaware of any Grievance Board decision or authoritative case law involving controversy over the meaning of this rather qualification.

There were no representatives of OEPA at the Level III hearing to more fully explain the basis for its oral directive. However, OEPA conveyed to Respondent that, in order to be sufficient under the statute, the diploma must be properly accredited, i.e., issued from a properly accredited agency. Grievant maintains that an “accredited” diploma is not required, but provides no authoritative basis for this argument. State Boards of Education throughout the United States only accredit public high schools that meet their minimum performance standards. “Diploma” is defined as “1. an official or state document: charter; 2. a writing usually under seal conferring some honor or privilege; 3. a document bearing record of graduation from or of a degree conferred by an educational institution.” Merriam-Webster.com. The requirement of a “high school diploma” as a prerequisite for hiring has an ordinarily accepted meaning. When an employer, whether

in the private or public sector, advertises or posts a position that requires a job applicant to possess a “high school diploma” to qualify for the position, any employable adult comprehends what level of educational attainment the employer expects. It is commonly understood that the diploma is expected to certify that the recipient has *obtained the minimum education* (typically required at the time of issuance)¹⁹ of a high school graduate.²⁰ A transcript provided by the high school should set forth the coursework undertaken to earn the diploma and reflect, through grades or otherwise, that the recipient achieved basic mastery of the prescribed standard high school curriculum, often referred to as the “core curriculum.” Therefore, if an employee provides her employer with a document entitled “high school diploma” from an entity or institution that either failed to teach the standard four-year high school curriculum or did not provide a meaningful assessment of the student’s mastery of the curriculum, then that diploma is insufficient under the statute, i.e., it has been issued by a “diploma mill,” a term used by OEPA and Respondent to reflect that the institution issuing the diploma is illegitimate.²¹

Neither Respondent nor Grievant pointed to any relevant statutory or regulatory authority in support of their arguments concerning whether Grievant’s “high school diploma,” was sufficient under W. VA. CODE §.18A-2-5. It is a cardinal rule of statutory

¹⁹ It is generally recognized that curriculum, which is considered core or basic to a high school education, varies over time based upon, e.g., workforce development needs and developments in technology, etc.

²⁰ Otherwise, to use a common colloquialism, the diploma “would not be worth the paper it is printed on.”

²¹ Webster’s Third New International Dictionary defines a “diploma mill” as, “an institution of higher education operating without supervision of the state or professional agency and granting diplomas which are either fraudulent or because of the lack of proper standards worthless.” Though this definition applies to institutions of higher education, this definition is equally suitable to describe a secondary school “diploma mill.”

construction that each section of a statute must be considered in the context of the entire statutory scheme of which it is a part, and statutes relating to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments. *W. Va. Dept. of Health and Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993); *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992). Therefore, a review of these authorities as they relate to the West Virginia State Board of Education's "minimum standards" for granting high school diplomas, by both public and private high schools in the State, is helpful to more fully describe the nature and quality of the education and assessment necessary to obtain a legitimate high school diploma, not only in the State of West Virginia, but throughout the U.S., and to determine whether Grievant, as a recipient of a Belford diploma, has obtained a sufficient high school education. It is commonly recognized that minimum educational standards for public high schools throughout the U.S. are largely consistent, to insure that recipients of high school diplomas issued by U.S public high schools are uniformly prepared to enter the workforce or matriculate to postsecondary education.

WEST VIRGINIA CODE §.18-2-6, "Classification and standardization of schools; standards for degrees and diplomas; certificates of proficiency; establishment of alternative education programs" states:

(a) The State Board of Education ... [is responsible to] ... promulgate rules for the accreditation, classification and standardization of all schools in the state, except institutions of higher education, and shall determine the minimum standards for granting diplomas and certificates of proficiency by those schools.

and

(2)(b) An institution of less than collegiate or university status may not grant any diploma or certificate of proficiency on any

basis of work or merit *below the minimum standards prescribed by the state board.*

(c) A charter or other instrument containing the right to issue diplomas or certificates of proficiency may not be granted by the State of West Virginia to any institutions or other associations or organizations of less than collegiate or university status within the state until the condition of granting or issuing the diplomas or other certificates of proficiency has first been approved in writing by the state board.²²(Emphasis added.)

By this statute, the Legislature empowered the West Virginia State Board of Education (“State Board”) to determine the minimum standards for granting diplomas and specifies *diplomas may not be granted for work below minimum state standards.* Additionally, the statute states that the right to issue a diploma may not be granted unless first approved by the State Board.

The OEPA and Respondent also described Grievant's diploma as insufficient in that it was not “accredited.” West Virginia public high schools must meet strict criterion to obtain State Board accreditation in order to issue diplomas.²³ The “Glossary” of the Legislative Rules at 126 CSR 13.4.4 defines “accreditation” as,

“WEST VIRGINIA CODE §.18-2-5 and Policy 2322 requirement that establishes a process for monitoring the performance and condition of schools and school systems to determine (1) verification of school performance grades, (2) compliance with policy and WEST VIRGINIA CODE, (3) school quality based on Policy 2322 (4) school and school system resource [sic], facility [sic], efficiencies, and capacity building needs, and (5) best practices.”

²² Private schools may also issue diplomas, provided they meet the various requirements of WEST VIRGINIA CODE §18-8-12, but as indicated at WEST VIRGINIA CODE §18-2-6, the State Board must approve the issuing of these diplomas.

²³ It is common knowledge that the U.S. Department of Education does not have the authority to accredit private or public secondary schools, as it does with institutions of higher education, and does not recognize accrediting bodies for the accreditation of private or public secondary schools. Therefore, State governments have undertaken the accreditation process throughout the United States.

There are numerous, stringent requirements which West Virginia public schools must meet to obtain state accreditation, as indicated by this rule. However, “accredit” is more generally defined as “to recognize or vouch for as conforming with a standard” and “to recognize (an educational institution) as maintaining standards that qualify the graduates for admission to higher or more specialized institutions or for professional practice.” Merriam-Webster.com.

The Legislature has empowered the State Board, pursuant to WEST VIRGINIA CODE § 18-2-6, to determine minimum educational standards necessary to grant diplomas and requires the State Board to finally approve charters containing the right to issue diplomas within the State. These statutory safeguards operate to insure the quality of the education provided by West Virginia public high schools and the integrity of State Board authorized diplomas. It would therefore be inconsistent with the general objectives of these authorities to allow county boards of education to accept “diplomas” issued “on [the] basis of work or merit below the minimum standards prescribed” by their own State Board, from institutions that could not meet the State’s criterion for accreditation.²⁴

In determining whether Grievant's high school diploma is sufficient, it is also appropriate and instructive to consider that W. VA. CODE § 18A-2-5 allows county boards to accept a GED, as well as a diploma. Under the authority of WEST VIRGINIA CODE §§ 18-2-5 and 18-8-6, the State Board of Education promulgated the Legislative Rule at 126 CSR 32, “Issuance of State of West Virginia High School Equivalency Diploma (2444.4)” which states, in pertinent part:

1.1. Scope ... the purpose of the State of West Virginia School Equivalency Diploma is to *provide appropriate recognition of the*

²⁴ WEST VIRGINIA CODE § 18-2-6(2)(c).

educational attainment to those individuals who have demonstrated that they have attained academic skills equivalent to those at the high school completion level by satisfactorily passing the high school equivalency assessment approved by the West Virginia Department of Education. (Emphasis added.)

and

1.1.a. West Virginia Department of Education approved high school equivalency assessment *mirrors the common core standards and performance standards reflected at the national and state levels* and demonstrate the attainment of developed abilities acquired through completion of a four-year high school program of study. *(Emphasis added.)*²⁵

These rules reflect what is ordinarily understood, that individuals who have earned a GED have attained academic skills equivalent to those who have successfully completed a four-year program of academic study at a high school. The acquisition of these skills is confirmed by an assessment that reflects “*the common core standards and performance standards at ... national and state levels ...*” *(Emphasis added.)* As stated above, it is commonly understood that a “high school diploma” is expected to certify that the recipient has obtained the minimum education (typically required at the time of issuance) of a high school graduate. However, to the extent that “high school diploma” is at all ambiguous, it should be construed consistently with the above discussed statutory and regulatory requirements for issuance of a “high school diploma” or receipt of a GED in the State of West Virginia. The “high school diploma” required under W. VA. CODE § 18A-2-5 should constitute proof that the recipient has met minimum educational standards, generally prescribed throughout public high schools in the United States, for granting diplomas in

²⁵ Common core (required essential course work) and performance standards have evolved and certainly will continue to evolve dependent upon numerous factors, including market forces, educational and technological developments and changing work force needs.

those public high schools, which is generally coincident to obtaining state accreditation or approval.²⁶

In response to OEPA's directive to correct the deficiencies, Superintendent Doty and Ms. Thompson met with Grievant to question her concerning the nature and rigor of the courses or curriculum she took with Belford and its means of assessing her mastery of the content taught. Grievant informed Respondent that she paid approximately \$200 to Belford to obtain her diploma. Grievant's admission that Belford would have fraudulently provided the "correct year" of her high school graduation on her diploma if Grievant would have paid for the added date was particularly concerning. Grievant also received materials from Belford and asserts she studied them. While the undersigned believes that Grievant may have studied some educational materials from Belford, her recollection of the nature of her studies was very vague. Grievant recalled writing essays in connection with her studies. At hearing, Grievant provided more detail of the Belford program and degree then she apparently provided to Superintendent Doty and Ms. Thompson in their December 16, 2014 meeting. However, Superintendent Doty and Ms. Thompson credibly testified Grievant told them she had taken only one on online test. Even in the TASC course, more than one "test" is required. To prepare for the high school equivalency assessment, prior to the final five-subject assessment, students take preparatory tests or exams, which permit them to qualify to take the final assessment. Belford provided a transcript of Grievant's studies, which included Algebra I and Chemistry. Grievant could recall very little about studying these subjects, which strongly

²⁶ Throughout the United States, public high schools are accredited or approved by their State Board of Educations or similar state-authorized educational entities.

indicates that, even if she did study them, they were not very rigorous or “up to “minimum educational standards.” Based upon the foregoing, Respondent proved by preponderance of the evidence that Grievant’s “high school diploma” issued from Belford did not meet the educational qualifications of W. VA. CODE § 18A-2-5.

However, Grievant insisted that in 2009, Respondent, through its personnel, specifically determined that Belford would provide adequate credentials to qualify her as a bus operator, when she asked them about Belford.²⁷ Whether specific assurances were made or not, it is undisputed that the school district did not take issue with the Belford diploma at the time it hired Grievant, and accepting the diploma was clearly Respondent’s mistake. Grievant asserts Respondent cannot now renege on this decision. However, under the doctrine of *ultra vires*, Respondent cannot be bound by its agents who accepted the diploma, as they acted outside their authority, in violation of W. VA. CODE § 18A-2-5. “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]” *Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 328 S.E.2d 356 (W. Va. 1985).” Moreover, Respondent is not only permitted, but encouraged, to promptly correct its mistake. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000). *See also Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec.

²⁷ Respondent introduced some evidence at the Level III hearing in support of its apparent contention that Grievant attempted to deceive the county school board by presenting an illegitimate diploma from Belford. However, Respondent did not address this argument in its post-hearing filing and, therefore, it is deemed abandoned.

31, 1997). To correct its mistake, Respondent required Grievant to obtain her GED. This corrective action by Respondent was reasonable and permitted under W. VA. CODE § 18A-2-5, as will be fully discussed below.

The remaining issues are: whether Respondent permissibly required Grievant to obtain her GED and if so, whether the period of time it gave her to obtain it was reasonable and whether Grievant was permanently, temporarily or provisionally educationally qualified for recertification, by continuing to be enrolled in the ABE classes to obtain her GED. The resolution of these issues hinges upon the proper application of the “contingency provision” of W. VA. CODE § 18A-2-5.

Respondent maintains it properly required Grievant to correct the deficiency by earning her GED and that mere continued enrollment in the GED program did not make her educationally qualified. When she failed to pass the exam by the time recertification was required, Respondent believed it had no choice but to terminate Grievant, because Superintendent Doty had been advised that she could not recommend Grievant for recertification because she had neither a GED nor a diploma. Grievant responds that that as long as she was continuously enrolled in a GED program, she was educationally qualified to continue working in her position, based upon the final provision of the educational qualifications section of W. VA. CODE § 18A-2-5, which is a contingency clause.²⁸ In their post hearing filings, neither party reviewed the language of W. VA.

²⁸ For ease of reference, W. VA. CODE § 18A-2-5 is herein repeated, in pertinent part. The pertinent portion of the statute states, “ ... a county board shall not employ ... any person who has not obtained a GED or who is not enrolled in an approved adult education course by the date of employment in preparation for obtaining a GED: **Provided, That such employment is contingent upon continued enrollment or successful completion of the GED program.**” (*Emphasis added in bold.*)

CODE § 18A-2-5, or its vital contingency clause, in support of their respective positions on the issues in dispute. However, a brief analysis and proper application of this contingency provision are critical to resolving these issues.

First, the undersigned will determine whether the statute authorized Respondent to direct Grievant to obtain her GED to keep her job. Under the contingency clause, Respondent can hire an individual who is enrolled in an adult education program at the time hired, contingent upon that individual subsequently meeting *one of two conditions*, continued enrollment in the GED course *or* successful completion of the GED. Grievant effectively asserts this allows her to be enrolled in an adult education course *ad infinitum* and never have to pass a high school equivalency assessment. This presumes Respondent has no authority to *choose* whether the employee it provisionally hired may remain perpetually enrolled in a GED course and still preserve her employment *or* must eventually pass the GED exam to maintain her position. However, the plain language of this clause clearly permits the county school board to hire an individual without a diploma or GED, but who is enrolled in a GED program, with the stipulation that the employee must, in time, obtain her GED, if she is to maintain her position. This clause also permits the county board to allow an employee to remain continuously enrolled in a GED program and still retain her position.²⁹ However, it would be incongruous with the general requirement of the statute to hire a more highly educated service personnel workforce for the county board to allow the latter. Nonetheless, the plain language of the contingency

²⁹ If the County Board of Education permitted this, from a practical standpoint, e.g., it would be difficult for an employee to continuously remain enrolled in a GED program for years.

clause permits it.³⁰ Respondent did not elect to allow Grievant to remain in the GED program, but reasonably chose to require Grievant to obtain her GED, within a particular time period. Thus, Grievant was conditionally educationally “qualified” under the proviso at WEST VIRGINIA CODE § 18A-2-5, as she was enrolled in the ABE program to prepare for TASC through the time of her discharge. Therefore, Respondent was in error when it determined that she was “incompetent” under W.VA. CODE § 18A-2-8, which was the cause for her dismissal. Based upon the foregoing, Respondent acted arbitrarily and capriciously in terminating Grievant for incompetency under W.VA. CODE § 18A-2-8.

The remaining question is whether the time limitation Respondent imposed upon Grievant to obtain her GED was reasonable. W. VA. CODE § 18A-2-5 does not limit the time for the “already enrolled” employee to obtain her GED. Absent any time limitation, Respondent was permitted to impose a deadline. However, Respondent cannot arbitrarily and capriciously select a deadline that does not permit a reasonable period of time for school service personnel to obtain a GED and then use that failure to terminate employees. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

In support of its contention that approximately six or seven months was a reasonable time period to impose, Respondent showed that one bus operator was able

³⁰ This proviso would make more sense, in relation to the added educational qualifications, if “and” was substituted for “or” and the period to obtain a GED was specified therein.

to obtain her GED in approximately three months; about half the time Grievant was finally allotted. Additionally, the ABE instructor indicated that --- presumably in his anecdotal experience --- it typically takes approximately three months for individuals to adequately prepare for and pass the TASC exam, with “good effort.” However, Respondent apparently failed to consider the instructor’s further testimony that it takes others up to two years to pass, putting forth a good effort. There are clearly significant differences in learning styles and abilities between individuals that necessarily affect their “learning curve.” Moreover, those who have been out of the high school classroom for awhile, such as Grievant, will likely need more time than those who have more recently been in school to master the concepts and content of a high school curriculum. The ABE instructor specifically testified Grievant did not make a good effort in terms of class attendance as compared to others. However, it is unclear to whom the ABE instructor compared Grievant. For instance, there may be unemployed individuals who have far more time to attend ABE classes, as compared to Grievant who was then still employed. The undersigned finds that, other than the month of February of 2015, when she sustained a work-related injury, Grievant attended ABE classes with some regularity and frequency. In addition, the undersigned finds that instructor could not necessarily correctly judge Grievant’s effort based solely upon her class attendance, because TASC exam preparation material is also available online. There are five sections on the TASC exam and Grievant only passed one. If the test taker fails the TASC assessment, there is a waiting period of one month to take it again. Based upon the foregoing, and considering that exams can be cancelled, as they were in July of 2015, this process may move slowly for some individuals who are making a good effort.

Additionally, Grievant took the TASC on or about June 23, 2015, and was given an extension according to Respondent. However, the TASC exam was suspended for a period of time after the June of 2015, test date, and was not available in July of 2015, when it typically would have been. Respondent failed to address the fact that the extension was meaningless under these circumstances and it is unclear from the record that Respondent was even aware when it granted the extension to Grievant in July of 2015, that the TASC exam was suspended. Therefore, practically speaking, Grievant did not have any time beyond June 30, 2015, to take another exam before the school board met and terminated her. Thus, Grievant had approximately six and a half months, rather than seven and a half, as a limitation.

Grievant and two other bus operators with unaccredited, illegitimate diplomas were given until June 30 of the school year during which the deficiency was identified to pass the GED because this was on or about the end of the school year and the recertification deadline for the upcoming school year was pending at about that time. Therefore, no matter when Respondent randomly identified an employee who was educationally unqualified, the June 30 year-end deadline to obtain a GED was imposed. The end of the school year and the need to recommend drivers for recertification arbitrarily dictated this deadline. Respondent may have believed it was being fair by imposing the same year-end deadline for these bus operators to obtain their GED's, but it was patently unfair as one operator had far less time to prepare and pass the GED than Grievant.³¹ The fact

³¹ One employee timely passed the GED. It is unclear whether the other employee passed it.

that Grievant had more time to obtain her GED than another bus operator does not prove that the time she was given was adequate and reasonable.

A good faith argument may be made that Respondent acted reasonably in limiting Grievant to approximately six months to pass the GED. However, there was no apparent urgency for Grievant to pass the TASC in order to safely or fully serve the students and school system, given that Grievant's work had been acceptable while employed by Respondent. In consideration of the foregoing, but particularly because there is significant disparity and variability in learning abilities and styles among individuals, the undersigned finds that the six month time limitation Respondent imposed upon Grievant to obtain a GED was arbitrarily chosen, based upon year-end recertification requirements, and unreasonable. Respondent must, therefore, allow Grievant to have an additional and reasonable period of time to obtain and submit her GED to Respondent. However, given that there is no time limitation imposed by W. VA. CODE § 18A-2-5, it is within Respondent's discretion to determine how much more time it will allow her to accomplish this.³²

Finally, Grievant introduced limited evidence in support of a claim of reprisal, but failed to address this claim in her post-hearing filing, therefore it is deemed to be abandoned

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden of proof by a preponderance of the evidence. Procedural

³² It seems to the undersigned that a year would be reasonable, but it is not within this ALJ's discretion to make such a determination.

Rules of the W. Va. Public Employees Grievance Board, 156 C. S. R. 1 § 3 (2008); *Ramey v. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). A preponderance “is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. Dep't of Health and Human Res.*, Docket No 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. VA. CODE § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991). See *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Respondent failed to meet its burden of proof that Grievant was incompetent under W. VA. CODE § 18A-2-8. Respondent acted arbitrarily and capriciously in terminating Grievant for incompetency.

4. County boards must abide by the requirement of W. VA. CODE § 18A-2-5 that, “ ... a county board shall not employ for the first time any person who has not obtained a high school diploma or GED or who is not enrolled in an approved adult education course by the date of employment in preparation for obtaining a GED: *Provided*, That such employment is contingent upon continued enrollment or successful completion of the GED program.” (*Emphasis in the original.*)

5. “ ‘In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.’ *Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey*, 399 S.E.2d 657 (W.Va. 1990), citing *Hodge v. Ginsberg*, 303 S.E.2d 245 (W.Va. 1983).” Also see *Lasure v. Tyler County Bd. of Educ.*, Docket No. 90-48-330 (Mar. 26, 1992). Clear and unambiguous language ordinarily must be applied not construed. *Miller v. Board of Educ. of County of Boone*, 190 W. Va. 153, 437 S.E.2d 591 (1993).

6. W.VA. CODE § 18A-2-5 does not prohibit a board of education from recommending recertification of school bus operators who do not possess a high school diploma or a GED provided that, by the date of their employment by the board of education, they were enrolled in an adult education class in preparation for obtaining a GED, continue to be enrolled in the GED program and are satisfactorily meeting one of the two “contingencies” permitted under W.VA. CODE § 18A-4-5, as specified by the county board of education.

7. It is commonly understood that a “high school diploma” is expected to certify that the recipient has obtained the minimum education (typically required at the time of issuance) of a high school graduate. However, to the extent that “high school diploma” at W. VA.CODE § 18A-2-5 is at all ambiguous, it should constitute proof that the recipient has met the minimum educational standards, generally prescribed throughout public high schools in the United States, for granting high school diplomas in those public high schools, which is generally coincident to obtaining state accreditation or approval.

8. “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]” *Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 328 S.E.2d 356 (W. Va. 1985).”

9. Grievant could not rely upon the representations of the members of the Respondent Board of Education, or its staff, that her high school diploma was sufficient, as these individuals had no authority to bind the Board of Education.

10. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000). *See also Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

11. Respondent made a mistake in accepting Grievant’s “high school diploma,” in that it erroneously believed the diploma was sufficient to meet the educational qualifications for school service personnel at W. VA. CODE § 18A-2-5. To correct its mistake, Respondent treated Grievant as if she had been hired for the “first time” under W. VA. CODE § 18A-2-5 and was “enrolled in an adult education course by the date of employment in preparation for obtaining a GED ...” Respondent properly chose, under the contingency clause of W. VA. CODE § 18A-2-5, to require Grievant to obtain her GED.

12. The proviso at W.VA. CODE § 18-A-2-5 permits county boards of education to hire individuals, for the first time, who do not possess high school diplomas or GEDs, but who are enrolled in GED programs at the date of employment. However, the county board of education must condition this employment upon the employee meeting one of two requirements specified at the final contingency clause of W.VA. CODE § 18-A-2-5;

that the employee either passes a nationally recognized, legitimate high school equivalency examination, such as the TASC or GED, within a reasonable period after hired, as prescribed by the county board, or remains continuously enrolled in an adult education program.

13. Respondent properly requested Grievant to obtain and submit proof that she had passed a nationally recognized, legitimate high school equivalency examination, such as the TASC or GED to correct her “educational deficiency” under W.VA. CODE § 18-A-2-5, but imposed an unreasonable, arbitrary and capricious deadline for Grievant to do so and wrongfully terminated her for incompetency under W.VA. CODE § 18-A-8, when she failed to meet this deadline.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to immediately reinstate Grievant to her position with the seniority, salary, benefits and back pay, including statutory interest, from the date of her termination in August of 2015, and to remove references of her termination from the records. Respondent is further **ORDERED** to allow Grievant an additional, reasonable period of time to pass the TASC assessment and submit official proof of same to it.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: February 25, 2016

Susan L. Basile
Administrative Law Judge